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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DUNIFU ALI KINCY, Defendant and Appellant.	B212639 (Los Angeles County Super. Ct. No. GA071703)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jacqueline H. Nguyen, Judge. Modified and affirmed with directions.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Dunifu Ali Kincy appeals from the judgment entered following a jury trial in which he was convicted of two counts of assault with a semiautomatic firearm and one count each of shooting a firearm with gross negligence, carrying a loaded firearm while an active participant in a street gang, and being a felon in possession of a firearm. Defendant contends the trial court erred by refusing to instruct upon self-defense, both in the charge and in response to a question by the jury; the evidence was insufficient to support his conviction of the aggravated assault or grossly negligent shooting of a firearm; and sentencing on three counts violated Penal Code section 654. (All further statutory references pertain to the Penal Code unless otherwise specified.) We modify and stay the sentence on one count, but otherwise affirm.

BACKGROUND

A shooting occurred near the intersection of Navarro Avenue and Howard Street in Pasadena about 6:20 p.m. on October 30, 2007. (All further date references pertain to 2007 unless otherwise specified.) No evidence introduced at trial established the identity of the original target or targets of the gunfire.

Isidro Nunez testified that he was driving east on Howard Street, toward its intersection with Navarro Avenue, when he heard two or three gunshots. When Nunez reached the intersection, he looked to his left (north on Navarro) and saw two African-American males standing outside a dark green car that was facing south. One of the men was standing behind the rear bumper of the green car and the other was standing outside the driver's door, which was open. The two men were shooting toward the northeast at a group of people who were near a white fence in front of a house. Nunez heard 10 to 15 shots, all of which sounded like the same caliber. Based on his knowledge of guns, Nunez thought that both of the gunmen were firing nine-millimeter semiautomatics. Nunez did not see any other vehicles in the street or in the area toward which the shots were fired. He did not see or hear any other guns being fired. Nunez honked at the gunmen. The gunman who was behind the green car fired two shots at Nunez's vehicle before getting into the front passenger seat of the green car. The other gunman got into

the driver's seat of the green car. Nunez turned south on Navarro Avenue and pulled to the curb. The green car drove past Nunez and he followed it. About 300 feet down Navarro Avenue, the two gunmen leaped out of the green car while it was still moving and fled on foot. No one else got out of the green car.

Pasadena Police Officer Veronica Burris and her partner were in front of a house on Navarro Avenue about one-quarter mile north of Howard Street when she heard two or three gunshots coming from the area of Howard and Navarro. She looked in the direction of the gunshots and saw a muzzle flash from the west side of Navarro. Burris and her partner jumped in their patrol car and drove south toward the intersection of Howard Street and Navarro Avenue. A sedan and a red or burgundy SUV driving northbound on Navarro passed the officers. "Witnesses" pointed down Navarro Avenue, past Howard, so Burris drove through the intersection and saw a green Dodge Intrepid that had crashed into a white SUV parked at the curb, about 100 feet south of Howard. The car was unoccupied when Burris arrived. The keys were in the ignition and the radio was playing, but Burris could not remember whether the engine was running. The front seats were reclined far back, a jacket and shirt were left inside the car, and there was a bullet hole in the driver's side rear quarter panel.

The owner of the white SUV testified that she was in her front yard and heard gunshots. She saw two "guys" running down the opposite side of the street, and the green car then crashed into her SUV. The green car's engine was still running immediately after the collision.

Sixteen-year-old James W. testified that he was sitting in front of 1617 Navarro Avenue, on the west side of Navarro, north of Howard Street, when he saw a car drive past. He was not sure what color the car was, but told a police officer it was gray. James saw the car stop near the intersection, just north of Howard Street. Someone got out of the driver's side of the car and fired a gun toward the north. James did not see anyone else shooting and all of the shots sounded the same. He thought the shooter was an African-American male. James ran inside the house. James told Pasadena Police Officer

Jonathan Buchholz that the driver of the car shouted, "'What's up, Blood?'" before he began shooting. The driver was wearing a red baseball cap. Buchholz showed James the crashed green Intrepid, but James did not identify that car as the one from which the shooter emerged.

Carl Phifer was walking up his driveway to his garage at 1625 Navarro Avenue, which was on the west side of Navarro about five houses north of Howard Street, when he saw a young woman get out of a red SUV that stopped across the street from his house. About 15 seconds later, Phifer heard gunshots or firecrackers. The kids who had been sitting outside the house next to Phifer's ran. The red SUV then sped off northbound on Navarro. The driver seemed to be leaning, as if trying to avoid something. At trial, Phifer denied seeing a green car or anyone shooting. But Phifer told Detective Kevin Okomoto that he heard shots and saw a red SUV "spinning off" northbound with the driver leaning over as someone in a small, dark green car driving southbound on Navarro shot at the red SUV. The prosecutor played a recording of Okomoto's conversation with Phifer at trial.

At the time of the shooting, Carmen Garcia lived at 1592 Navarro Avenue, north of Howard Street. She thought she heard firecrackers and looked out the window. She saw a car facing Howard Street parked in front of her driveway. The driver's door was open and Garcia, whose view was partially blocked by a tree, saw legs standing alongside the door. Garcia saw muzzle flashes and realized the noises were gunshots. The person outside the car got into the driver's seat and the car went south on Navarro Avenue across Howard Street.

The police found a number of casings on and south of a speed bump on Navarro Avenue. Eight nine-millimeter casings were found between the speed bump and Howard Street. Six of those were at or near the eastern curb line and two were near the western curb line. All of the nine-millimeter casings were made by the same manufacturer except one found on the east side of the street. The police also found four .40-caliber casings: two atop the speed bump and two at the south edge of the speed bump. The two

"concentrations" of bullet casings were approximately 20 to 30 feet apart. The police also found two "red metal flake paint chips from a vehicle" and a copper jacketed bullet fragment on top of the speed bump, near the .40-caliber casings. An expended bullet was found along the eastern curb line.

On October 31, defendant phoned the Pasadena Police Department and asked about reclaiming the car he had abandoned on Navarro Avenue on October 30. Detective Okomoto spoke with defendant four times by telephone during November. Portions of recordings of the telephone conversations were played at trial. Defendant told Navarro he had just purchased the car and the papers pertaining to the sale and transfer of title were in the car's glove compartment. Defendant told Okomoto that he was driving south on Navarro, and when he reached the stop sign at Howard, someone began shooting. Defendant did not know who was shooting or whether the person was shooting at him. He continued driving, but as his car "hit the dip," it "cut off." He still heard shots, so he and his passenger, whom he declined to identify, got out and ran away on foot. He did not know if his car had been struck by the gunfire. Okomoto testified that defendant said the shooter was on the sidewalk, though this statement does not appear in the transcripts of the recording segments played at trial.

The prosecution's gang expert, Detective Keith Gomez, opined that defendant was an active member of the Project Gangsters, which was a Blood gang in Pasadena. The Squiggly Lane gang and Project Gangsters were "vicious enemies." A number of Squiggly Lane gang members lived and congregated on the block where the October 30 shooting occurred, making it enemy territory for Project Gangsters members. Gomez testified that when a member of a Blood gang addresses a member of the community or rival gang member with "What's up, Blood?" it is confrontational and "usually precedes violence." He opined that a member of the Project Gangsters who drove through a neighborhood claimed by the Squiggly Lane gang would "absolutely" be armed, probably with a handgun or rifle, and would "most likely" enter the area with the intent to shoot and kill a rival gang member to enhance the reputation of both the perpetrator and the

gang. In response to a hypothetical question based upon the testimony of Nunez and the testimony and statements of James W., Gomez opined that the October 30 shootings would have been committed for the benefit of, and with the specific intent to promote and benefit the Project Gangsters gang because it would boost the reputation and strength of the gang and intimidate the gang's enemies and the public.

Defendant presented no evidence.

The jury convicted defendant of two counts of assault with semiautomatic firearm (§ 245, subd. (b)), and one count each of shooting a firearm with gross negligence (§ 246.3, subd. (a)), carrying a loaded firearm while an active participant in a street gang (§ 12031, subd. (a)), and being a felon in possession of a firearm (§ 12021, subd. (a)). The jury also found that each of these crimes was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (§ 186.22, subd. (b).) The jury further found that a principal was armed with a firearm in the commission of the assault upon Nunez and defendant personally used a firearm in the commission of the assault upon the unidentified victim. Defendant admitted a section 667.5, subdivision (b) prison term enhancement allegation. The trial court sentenced defendant to 24 years in prison.

DISCUSSION

1. Refusal to instruct upon self-defense

Defendant asked the trial court to instruct upon self-defense. The trial court refused to do so because it did not believe self-defense was applicable.

During deliberations, the jury asked the court to define "gross negligence" for purposes of the offense of shooting a firearm with gross negligence and inquired, "Would self-defense be considered gross negligence?" Both attorneys and the court agreed upon the court's response, which directed the jury to refer to the jury instructions for the definition of gross negligence and advised, "No further definition can be given."

After conviction, defendant moved for a new trial based upon the court's refusal to instruct upon self-defense. In denying the motion, the court explained, "With regard to the facts of this case and the evidence that was presented at trial, it's very distinguishable from the case of People versus Elize . . . that's cited in counsel's motion. [¶] In that case the defendant had testified that he fired the gun accidentally. So the question is whether the jury accepts that and therefore triggers the self-defense or whether the jury would choose to reject that version and find that the firing was intentional. [¶] Here in the present case, Mr. Kincy's statements, as presented during his post-arrest [*sic*], recorded statements, indicated that he never fired at all. So it was an all-or-nothing position by Mr. Kincy, per his own statements that he was there, but he was shot at, he did not fire the gun. And so, therefore, he's not responsible for any of the charges by the People. [¶] There was no evidence of self-defense and so I think the court acted appropriately in refusing to give the self-defense instruction."

Defendant contends that the trial court's refusal to instruct upon self-defense violated his rights to due process and to present a defense.

With respect to self-defense or any other defense theory, the trial court must give a requested instruction only if substantial evidence supports the defense or theory. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) In deciding whether evidence is substantial enough to require an instruction, the court determines only its bare legal sufficiency, not its weight, and does not weigh the credibility of witnesses. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, overruled on another ground in *Christian S.*, at p. 777.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citations.]" (*Flannel*, at p. 685.) The test is not whether there is *any* evidence, but whether there is evidence from which a reasonable jury could have found the specific facts supporting the instruction. (*Id.* at p. 684.)

Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Jefferson* (2004) 119 Cal.App.4th 508, 518.) The trier of fact must consider

what would appear to be necessary to a reasonable person in the position of the defendant, with the defendant's knowledge and awareness. (*Humphrey*, at pp. 1082–1083; *Jefferson*, at p. 518.)

The instruction defendant requested, CALCRIM No. 3470, would have instructed the jury, in pertinent part, "Self-defense is a defense to 245(b) PC, as charged in Counts 1 and 5. The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger." The instruction also stated, "Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation."

Substantial evidence did not support instruction upon self-defense. Viewed in the light most favorable to giving the instruction, the evidence showed (1) defendant heard gunshots as he was driving; (2) although defendant did not know who was shooting or whether the shooter was firing at him, defendant was frightened; (3) defendant attempted to flee from the gunfire by driving through the intersection, but his car stalled after he crossed Howard Street; (4) at least two guns were used in the shooting, as shown by the two different calibers of casings; (5) defendant did not know if his car had been struck by the gunfire; and (6) at an undetermined time, a shot had struck the driver's side of defendant's car. Under this scenario, defendant had no involvement in the shooting. He simply drove down the street, before and after the shots were fired. He did not know if the shots were fired at him. At most, this evidence supports the element of actual and perhaps reasonable belief in an imminent danger of bodily injury. It does not show a reasonable belief in the necessity of using force to defend against that danger or the use of reasonable force.

Citing *People v. Elize* (1999) 71 Cal.App.4th 605 (*Elize*), defendant argues that instruction on self-defense was required because the jury might have disbelieved his statements to Okomoto that he simply drove through the area and was not involved in the shooting. In essence, defendant argues that the jury might have believed defendant's statement that he was just driving along and shots were fired at him, but disbelieved defendant's statement that he kept on driving and instead credited the prosecution's evidence that defendant stopped his car on Navarro Avenue north of Howard and fired shots at someone. If the jury were to arrive at such a scenario, the evidence would still fall short of establishing the following elements required for self-defense: (1) when defendant heard the shots, he actually and reasonably believed that it was necessary for him to stop his car, get out, and return fire to defend himself against an imminent danger of bodily injury, instead of simply driving out of the area, as he claimed he had done; and (2) when defendant fired the gun, he did so because he believed in the need to defend himself, and not due to another reason, such as gang rivalry.

In *Elize*, *supra*, 71 Cal.App.4th 605, two of the defendant's girlfriends came together to his workplace and attacked him with an object. An eyewitness, one of the girlfriends, and the defendant all testified that a physical altercation occurred between the defendant and the two women, and it was undisputed that the defendant suffered a broken wrist. The girlfriend claimed she hit the defendant with a cell phone, while the defendant testified that both women struck him repeatedly with iron pipes. The defendant, who was an armed guard, claimed that the testifying girlfriend attempted to grab his gun, they struggled for it, he pointed it upward, and it fired accidentally. The girlfriend denied attempting to grab the gun and testified that the defendant pulled the gun from his holster and fired it toward her chest. The uninvolved eyewitness did not see the gun. (*Id.* at pp. 607–609.) The trial court refused to instruct on self-defense because the defendant had testified that the shot was fired accidentally. The appellate court reversed, stating, "In the instant case, a jury could find from the evidence presented that defendant was sought out and attacked by two angry women much larger than he, that he was being beaten with

pipes, that this beating accounted for his broken wrist, that one of the women tried to take his handgun, and that he struggled with that woman while the other continued to beat him. A jury could disbelieve defendant's testimony that the gun fired accidentally during this struggle. A jury could find that defendant fired the gun intentionally, hoping to end the attack upon him either by hitting one of his assailants or by firing into the air to scare off his attackers." (*Id.* at pp. 615–616.)

The present case is distinguishable from *Elize* in that there was no dispute in *Elize* that the girlfriends attacked the defendant and broke his wrist. There was also no dispute that the defendant's gun was fired and his hand was on the gun when it fired. The uncertainty pertained only to how the gun came to be fired and the defendant's intent (if any) in firing it. The appellate court merely held that the jury could disbelieve the defendant's testimony that his gun fired accidentally during a struggle and instead believe he fired intentionally to end the attack upon him, which the girlfriends initiated. Here, defendant's statements presented a scenario that was completely incompatible with the events described by the several witnesses to the shooting. According to the prosecution witnesses, defendant and his passenger were the aggressors who got out of defendant's car and shot at people on the sidewalk or perhaps at the occupants of a red SUV. In defendant's scenario, he was merely an innocent bystander who fled gunfire and neither stopped his car nor fired a gun. Defendant never admitted that he engaged in the conduct underlying the charged offenses. He never admitted that he stopped his car when he heard gunfire, that he or his passenger had a gun, or that he or his passenger fired a gun. It was defendant's assaultive conduct, not the intent with which it was undertaken, that defendant disputed. Although the jury might well disbelieve defendant's statements, such disbelief would not merely turn upon his mental state and the issue of whether a gun was fired intentionally or accidentally, as in *Elize*. The jury would instead have to disregard defendant's denial of any participation in the shooting and construct a new defense for defendant by using portions of the prosecution's case to fill the extensive gaps regarding the conduct of defendant and his passenger. In order for the jury-constructed scenario to

amount to self-defense, the jury would have to speculate that defendant and his passenger, after coming under fire, got out of the car and fired back because they actually and reasonably believed doing so was necessary to protect themselves from imminent threat of great bodily injury. Under the circumstances, the evidence was insufficient to require the trial court to instruct upon self-defense.

Defendant further argues that the prosecution's theory that defendant's passenger fired at Nunez and defendant was an aider and abettor with respect to that assault entitled him to self-defense instructions. Although an aider and abettor is entitled to claim self-defense where the direct perpetrator acted in self-defense, there must be evidence showing that the direct perpetrator acted in self-defense to require self-defense instructions. The evidence supporting a theory that defendant's passenger acted in self-defense was even less substantial than that supporting defendant's personal self-defense claim because no evidence reflected the passenger's state of mind or perception of events.

2. Response to jury's question

Defendant contends that the trial court violated section 1138 and due process—both his right and the jury's right—by failing to instruct upon self-defense in response to the jury's question about gross negligence. Defendant cites no authority establishing that the jury has a due process right to instruction or that he has standing to assert a violation of such right.

As noted in the prior section of this opinion, the self-defense instruction defendant requested expressly applied only to the aggravated assault charges in counts 1 and 5. Nothing in the record indicates that defendant informed the court that his self-defense theory extended to any other charges. When the jury asked whether self-defense would constitute gross negligence in relation to the offense of shooting a firearm with gross negligence (count 2), both counsel agreed that the court should simply "let the jury know that gross negligence [was] defined" in the jury instructions, without providing any additional definition. Defense counsel did not urge that the court should instruct upon self-defense with respect to count 2 or that the jury's question illustrated the necessity of

giving the self-defense instruction defendant previously requested regarding counts 1 and 5.

Because defense counsel consented to the court's response to the jury's question, defendant forfeited any claim based upon the purported inadequacy of the court's response. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Even if defendant had not forfeited his claim, we would reject it. When a deliberating jury desires to be informed on any point of law arising in a case, the jury must be returned to court and the information required must be given. (§ 1138.) The court has a primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) But elaboration upon the original instructions is not necessarily required. (*Ibid*.) Where the original instructions are themselves full and complete, the court has discretion to determine what additional explanations are needed. (*Ibid*.) Simply instructing the jury to re-read particular instructions, as the trial court did in the present case, has frequently been held to be sufficient. (*People v. Davis* (1995) 10 Cal.4th 463, 522; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212–1213; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1178–1179.)

The trial court used CALCRIM No. 970 to instruct the jury on the offense of "shooting a firearm in a grossly negligent manner." This instruction defined "gross negligence" as follows: "Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury. [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act." This language is straightforward, readily understood, and properly defines "gross negligence." (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 539–540 ["Gross negligence, as a basis for criminal liability, requires a showing that the

defendant's act was '"such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences."'"].)

Defendant does not contend that the instruction defining gross negligence was deficient in any way, but instead argues that the instructions were incomplete because the court had not instructed upon self-defense. But the evidence did not support a self-defense theory. Under the circumstances, the instructions were complete. The jury's curiosity did not require the court to instruct upon an unsupported theory.

In addition, defendant never asked the trial court to instruct upon self-defense with respect to any charges other than the aggravated assault counts. The trial court's duty to instruct sua sponte regarding a defense arises only where it appears the defendant is relying on such a defense, or where there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Defendant's express limitation of his requested self-defense instruction to the aggravated assault counts, together with defense counsel's endorsement of the court's response to the jury's question negated any possibility that defendant was relying upon self-defense with respect to the offense of shooting a firearm with gross negligence. More important, substantial evidence did not support a self-defense theory and self-defense was inconsistent with defendant's claim that he was an innocent bystander and simply fled when he heard gunfire. The trial court thus had no duty to instruct sua sponte on self-defense in response to the jury's question.

Defendant's due process contention fails for essentially the same reasons. Neither the defendant nor the jury has a right to instruction upon a factually unsupported theory.

We conclude that the original instructions were full and complete, and the trial court's response to the jury's question was proper.

3. Sufficiency of evidence

Defendant contends that the evidence was insufficient to support his assault with a semiautomatic firearm and shooting a firearm with gross negligence convictions because the evidence did not establish "which of the groups initiated the shooting."

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

In order to convict defendant of assault with a semiautomatic firearm, the jury was required to find that defendant willfully performed an act with a semiautomatic firearm that, by its nature, would directly and probably result in the application of force to another person; defendant had actual knowledge of facts sufficient to cause a reasonable person to realize that his act by its nature will directly and probably result in the application of force; and defendant had the present ability to apply force with the firearm. (§§ 240, 245, subd. (b); *People v. Williams* (2001) 26 Cal.4th 779, 782; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In order to convict defendant of shooting a firearm with gross negligence, the jury was required to find that defendant willfully shot a firearm with gross negligence and the shooting could have resulted in injury or death. (§ 246.3, subd. (a).)

Collectively, the testimony of Nunez that the driver and passenger of the green car were firing guns at a group of people standing near a fence, the testimony of James W. that the driver of a car that stopped on Navarro Avenue just north of Howard Street got out and fired shots northward, the expended casings collected by the police, and the undisputed evidence that defendant was driving the green Dodge Intrepid abandoned on Navarro Avenue on October 30 established that defendant committed an assault with a semiautomatic firearm on an unidentified person as charged in count 5 and that he shot a firearm in a grossly negligent manner, as charged in count 2.

Count 1 charged assault with a semiautomatic firearm on Nunez. Given Nunez's testimony that the person who shot at him got into the passenger seat of the green car,

defendant's conviction in count 1 was necessarily based upon an aiding and abetting theory. This required the jury to find that defendant's passenger committed an assault with a semiautomatic firearm, defendant knew his passenger's unlawful purpose, and defendant intentionally aided, promoted, encouraged, or instigated the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 560–561.) The testimony of James W. showed that defendant stopped his car on Navarro Avenue just north of Howard. Nunez's testimony established that defendant and his passenger got out of the car and fired guns at the people they found in the neighborhood. After Nunez entered the intersection and honked, defendant's passenger turned and fired at him. Based upon defendant's conduct in stopping his car near the intersection, the coordinated conduct of defendant and his passenger in getting out of the car and shooting at people in the neighborhood—including Nunez, and defendant's conduct in attempting to drive himself and his passenger away from the scene, the jury could infer that defendant and his passenger were operating pursuant to a plan to shoot people in the neighborhood. The jury could further infer that defendant knew of and shared his passenger's intent to shoot people in the neighborhood, including people such as Nunez who entered the area while they were shooting, and that defendant facilitated the shooting by driving to the neighborhood, stopping the car, getting out of the car and shooting, and returning to the car to drive himself and his passenger away. Substantial evidence thus supported defendant's conviction in count 1.

Defendant's contention regarding the sufficiency of evidence is based upon an unsupported assumption that another person or group was shooting at the time of the incident giving rise to the charged offenses. No one testified that anyone other than defendant and his passenger fired shots. Defendant seemingly assumes that someone in the red SUV also fired shots, but no one testified to this. If anything, the evidence suggested defendant and his passenger fired at the SUV, which fled without any of its occupants firing a gun. Defendant theorizes that the evidence of the expended casings collected by the police established that two nine-millimeter guns and one .40-caliber gun

were used. But all of the nine-millimeter casings could have been expended from a single gun. Although defendant's car was struck by a bullet, the evidence did not establish that this occurred during the incident giving rise to the charged offenses. Defendant did not tell Okomoto that his car was struck by gunfire during the incident. The police did not recover the bullet that struck defendant's car and thus could not link it to either the .40-caliber or nine-millimeter guns used in the street shooting. If defendant's car was struck during the incident, it may have been struck by a shot fired by defendant or his passenger. In short, nothing in the record showed that anyone other than defendant and his passenger fired shots.

Substantial evidence supported defendant's convictions.

4. Section 654: counts 4 through 6

The trial court sentenced defendant to eight months for count 4 (possession of firearm by felon), 21 years for count 5 (assault with a semiautomatic firearm plus personal use and gang enhancements), and a two-year concurrent term for count 6 (carrying loaded firearm while an active participant in a street gang). Defendant contends that the sentences on counts 4 and 6 must be stayed pursuant to section 654 because his possession of the gun was not separate or independent from the use of the gun in committing the aggravated assault.

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid*.) But if a defendant had separate objectives that "were either (1) consecutive even if similar or (2) different even if simultaneous," multiple punishment is permissible, even if the crimes shared common acts or were parts of an otherwise indivisible course of

conduct. (*People v. Britt* (2004) 32 Cal.4th 944, 952 (*Britt*); *People v. Harrison* (1989) 48 Cal.3d 321, 335.) In applying section 654, the defendant's objectives must not be "parse[d] . . . too finely." (*Britt*, at p. 953.)

A conviction for firearm possession by a felon "presents a unique circumstance in the minefield of section 654 cases in that this charge involves an important policy consideration," namely, minimizing the danger to public safety arising from free access to firearms, a danger presumed to be greater when the person possessing the firearm is a convicted felon. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1409.) Whether possession of the gun and an offense in which the gun is used are divisible depends upon the facts of the case. (*Ratcliff*, at p. 1408; *People v. Bradford* (1976) 17 Cal.3d 8, 22.) Where the evidence shows a possession distinctly antecedent to and separate from the primary offense, both crimes may be punished, but where the evidence shows possession only in conjunction with the primary offense, both offenses may not be punished. (*Bradford*, at p. 22.) "[M]ultiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . .'" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144 (*Jones*), quoting *Ratcliff*, at p. 1412.) But "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Jones*, at p. 1145.)

The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Substantial evidence shows that defendant and his passenger were in possession of the guns when they arrived at the crime scene. James W. testified that the driver stopped the car, issued a gang challenge, then started shooting. There was no evidence that defendant obtained the gun from another person just before he began shooting, and Detective Gomez testified that a member of the Project Gangsters gang who drove through a neighborhood claimed by the Squiggly Lane gang (such as the block where the

charged offenses occurred) would "absolutely" be armed. Similarly, there was no evidence that defendant's passenger had both guns and handed one to defendant just before defendant began shooting. The more reasonable inference, with no contrary evidence in the record, is that each man in the car had a gun to carry out their mission to shoot rival gang members. Possession of the gun while driving in the car, before stopping to commit the charged offenses, supports a finding of separate intents to possess the gun and to use it. (*Jones*, *supra*, 103 Cal.App.4th at p. 1147.)

The trial court could thus impose unstayed sentences for both the assault with a semiautomatic firearm in count 5 and a firearm possession charge. But the court imposed unstayed sentences for two firearm possession charges (counts 4 and 6). Although sections 12021, subdivision (a) and 12031, subdivision (a) require proof of different elements (a felon in possession of any gun versus an active gang member in possession of a loaded gun), and the Legislature's intent in enacting each statute may have differed somewhat, the application of "[s]ection 654 turns on the *defendant's* objective in violating both provisions, not the Legislature's purpose in enacting them . . . ." (*Britt*, *supra*, 32 Cal.4th at p. 952.) Nothing in the record supports an inference that defendant had separate intents with respect to possession of the gun. To speculate that he had multiple intents, rather than simply the intent to possess the gun, would "parse[] the objectives too finely." (*Id.* at p. 953.)

Where section 654 applies to several counts, the longest term provided by any of those counts is the one imposed, while the shorter terms are stayed. The possible sentences for violating sections 12021, subdivision (a) and 12031, subdivision (a) are identical: 16 months, 2 years, or 3 years. (§ 18.) The trial court chose count 5 as the principal term and imposed a subordinate term of eight months (one-third of the mid term) for count 4. It should have imposed and stayed a consecutive term of eight months for count 6. The court instead imposed a two-year concurrent term for count 6, which violated section 654. (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.) We modify the sentence on count 6 to impose a stayed eight-month term, thereby complying with section

654 and giving effect to the trial court's obvious intent regarding the length of the sentence defendant will serve. (*Ibid.*)

5. Court security fees

At the time of defendant's conviction, section 1465.8, subdivision (a)(1) provided, in pertinent part, that "[t]o ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense . . . ." The Attorney General contends that the trial court imposed a single fee under this statute, whereas it should have imposed five such fees. But the trial court did not err: it imposed five section 1465.8, subdivision (a)(1) court security fees of $20 each for a total of $100.

DISPOSITION

The sentence on count 6 is modified to be an eight-month term that is stayed pursuant to Penal Code section 654. In all other respects, the judgment is affirmed. The trial court is directed to correct the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.